STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 9989
	)	
Appeal of	)	

INTRODUCTION

The petitioner seeks to expunge the "founding" by the Department of Social and Rehabilitation Services (SRS) that she sexually abused a child.

FINDINGS OF FACT

1. The petitioner is a single woman who lives alone. For ten years she has worked as a holistic counselor and "body worker". Among the services she provides to her clients are massage, lectures, and workshops on healing for incest and rape survivors and accident victims. She frequently receives referrals for her services from local private social services agencies.

2. In the course of her work some five years ago, the petitioner became acquainted with A.B., the mother of E.R., the alleged victim. A.B. had a studio apartment for rent directly across from her home and the petitioner became her tenant in November of 1986. Over time they also became good friends. The petitioner became friends as well with E.R., A.B.'s son who was then two years old and lived in the house across the way with his mother.

3. B.R., the boy's father also lived in the house

with the exception of some extended absences. The boy's parents had never been married and did not have a marital type relationship. Their joint presence in the house was for both financial reasons and the desire of both parents to be near their son.

4. The petitioner has no children of her own but likes children and has a reputation for being well-liked by them. She is reported to possess a special rapport with children based upon her ability to adopt a child-like perspective in dealing with them. The two year old E.R. was also attracted to the petitioner and frequently asked to play in her studio apartment. He saw the petitioner daily and spent about an hour there every other week playing with the petitioner and the toys she kept in the studio for him. She saw him two or three times per week at his home as well. Over the next two-and-a-half years, the petitioner and the little boy became close and often went on outings together and spontaneously displayed affection (i.e. hugging) towards each other.

5. E.R. is a bright, imaginative, very articulate child who is popular with children and other adults. He has been enrolled in an educational day care program since the summer of 1988 where he is described by his teacher as generally exhibiting age appropriate social and emotional behaviors and as being a friendly, and verbally expressive child. While he is usually not aggressive, he can be under certain circumstances especially when his role playing gets

out of hand. No behaviors indicating chronic distress, upset or anger have ever been observed in him by the school personnel. However, the evidence shows based on the testimony of several witnesses that as early as the winter of 1988 to 1989, E.R. exhibited a marked tendency (which a teacher testified was not unusual in four year olds) to use a good deal of vivid "potty language". This included the frequent nonsensical use of the words "vagina" and "penis" in conversation.

6. One day in the spring of 1989, after returning from playing at the petitioner's studio, E.R. was upset and refused to talk to his parents. An hour later, he reported to his father that the petitioner "looked in my bum, and I looked in hers". His father went to the petitioner's study to discuss this report. The petitioner explained to him that the two of them had been playing a game wherein the child pointed to a body part, such as the eyes or ears and she imitated him by pointing to the same part on her body. At some point in the game the boy "mooned" her by pulling his pants down and pointing to his rear and she quickly repeated the action by mooning him. The petitioner stated that it had been intended in fun, but if it had upset him, it was obviously inappropriate for him and that she would not repeat that mistake. Both parents readily believed this explanation and that the petitioner would do as she said. It was never discussed again. The petitioner was surprised by the reaction of E.R. and his parents to this incident as

she had felt they were people who had a fair amount of and good deal of tolerance for nudity in their household. Thereafter, she resolved to be more circumspect before E.R. and to avoid dressing or undressing before him in the small (one multi-purpose room and bath) studio or otherwise revealing herself to him.

7. The petitioner and E.R. saw each other less frequently later that spring due to the petitioner's work and E.R.'s school commitments. No invitations to come to the studio were extended to E.R. by the petitioner during that time. In the late spring of 1989, the petitioner rented a lakeside cottage and returned to her studio only for work appointments, spending all her weekends at the lake.

8. During the period of time following the "body parts game", A.B. began to notice that her child was using a lot of "foul" language. On one occasion he asked his mother following a bath to "kiss my penis", and later asked his mother if he could look into her vagina. A.B. got complaints from day care and other parents about the aggressiveness of his statements, i.e., "I'm going to rip open her vagina". She could not recall his being fixated on genitals before this time but did admit that he had complained that a baby-sitter had touched his penis some time before. She did not relate any of these statements at that time to the body parts games incident.

9. At times when the petitioner returned to the

studio in the late spring and early summer, E.R., for the first time exhibited aggressive behavior towards her. On one occasion he tried to hit her with a stick, on another he threw rocks at her, on a third occasion he tried to push the door closed in her face and covered his face when she came in the living room. A.B. was surprised at the behavior and instructed E.R. to apologize. She believed at that time that he was expressing anger because he had not been able to see the petitioner as much as he would have liked. The petitioner also believed that was the source of his anger and the fact that her behavior towards E.R. may have been more reserved following the "body game" incident.

10. After those three incidents, E.R.'s behavior towards the petitioner resumed its usual course although contact between the two was still limited. During the summer, the petitioner took E.R. to at least two parties where witnesses depicted him as being attached to her and very affectionate. He was also noted at those parties to have acted aggressively toward other children and to have used aggressive potty-talk. He pulled up the dress of one adult and yelled something like "I'll kick" or "rip out your vagina". Later in the summer, E.R. begged the petitioner to take him with her on a picnic she had planned to take with a friend and her two children. Both the petitioner and A.B. agreed that he could go and by all accounts he had a very pleasant day with no aggressive behavior noted. At another point in the summer, E.R. asked her to take him to dinner

but she was unable to do so. She invited him over on one occasion but he did not want to come. The only time the two of them were alone during the summer was on one occasion when they took a long walk outside together. There is no evidence that E.R.'s aggressive behavior toward the petitioner continued after the initial three incidents.

11. About two weeks after the petitioner had returned from a vacation in Maine, A.B. asked her to baby-sit for her son while she went out on a Friday night, October 20, 1989.

12. When A.B. told her son that he was to stay with the petitioner on Friday night he reacted with enthusiasm. However, as the actual time to go to her studio approached, the boy's mother found him in his room quiet and withdrawn. She approached him and asked him if he were sick or tired and he responded no but that he did not want to go out with the petitioner and added that he "didn't want to go out with her ever again". He added in response to A.B.'s questioning that "I don't want to look into her vagina".

13. A.B. responded by telling her son that he did not have to go to the petitioner's studio. When he said he was angry, she told him that she was angry about this as well and that she and his father would protect him.

14. That evening, A.B. went to her lecture as planned where she encountered a friend who is a professional counselor of victims of child sexual abuse. She related the afternoon's events to her friend and told him that she found it difficult to believe that the petitioner had sexually

abused her son and that she was ambivalent about what to do next. While he gave her no specific advice about what steps to take, he informed her that in his experience children rarely lie about these events and that she should take her son's statements seriously.

15. Over the weekend, A.B. did not discuss the matter further with her son who had a playmate staying with him during most of that time and who appeared happy and lighthearted. A.B. spent those two days on the telephone or meeting with friends of hers who are professionally involved in the field of child sexual abuse. She also called SRS for information about reporting but did not give her name. One friend who met with A.B. on Saturday described her as upset and crying softly but not out of control. On Sunday, L.M. the mother of the playmate, who is also a close friend of the petitioner's, came to pick up her son. She described A.B. as "hysterical" and unable to speak with her except to say that there was a crisis. A.B. brusquely escorted L.M. and her son out of the house while she held a telephone receiver in her hand. Based on this testimony, it is found that at least by Sunday, A.B. had become visibly very upset over the report.

16. On Monday, October 23, A.B. reported that she believed her son had been sexually abused by the petitioner to the Department of Social and Rehabilitation Services and set up an interview. A.B. again discussed the matter with her son that day. She testified that her son told her more.

She stated that he said the petitioner said to him "Let's do it" and without much clarity discussed some event involving a closed door and taking off their clothes or pants. He reportedly repeated that he was angry about "looking into her vagina" and reportedly stated that it had happened several times. A.B. did not attempt to discuss the matter with the petitioner who was at that time home in the studio. She did not discuss the matter with the boy's father because he was out of town.

17. Nothing was said by the child to A.B. on Tuesday, but she reminded him that she would make the petitioner leave the studio.

18. On Wednesday, October 24, the boy was interviewed by an SRS worker and a police investigator (who happened to be married to each other) in the presence of the boy's mother and father. A transcript of that interview was made and introduced into evidence. That document is attached hereto as Exhibit 1 and is incorporated by reference herein as an accurate representation of the questions posed to and answers made by the child in this matter. As part of that interview, the child also located the petitioner's vagina on a picture as a spot below her stomach.

19. At the suggestion of SRS, the petitioner prepared a written statement for the police. That statement went on for several pages and in addition to the child's alleged statements and a history of his relationship with the

petitioner included statements about the petitioner's childhood, adolescence, sexual orientation and the like. It also included a description of several events in the past which A.B. now considers suspiciously sexual. A copy of that letter is attached as Exhibit 2 and is incorporated by reference herein to show what statement was made to the police and A.B.'s state of mind. A.B. also testified at hearing as to most of these same facts. At the end of the letter, A.B. indicated her desire to see the petitioner quickly arrested for a felony and removed from the premises as a way of preventing the petitioner's denial of the charge.

20. The next afternoon, without warning, the police appeared at the petitioner's studio door with a court order requiring her to leave the studio immediately and to keep away from the boy and his parents. This was the first time the petitioner learned anything of this matter as A.B. had not spoken to her since E.R.'s initial Friday report except to ask to borrow her typewriter (which she used for the police report.) Stunned, the petitioner hastily left the studio, never to live there again and returned only briefly at a later time to retrieve her belongings.

21. Following her ejectment from the studio and arrest, the petitioner was for the first and only time interviewed with regard to the boy's allegations by J.H., the same police detective who had also interviewed the boy. He found her to be a willing and co-operative interviewee.

She told him about the body-parts game and other than that denied ever deliberately exposing herself to the boy. She did admit that it was probable that the boy has seen her without her clothes on because she usually left the door ajar when she used the bathroom to keep an eye on him had on occasion spoken with him while using the toilet and thought she had probably changed her clothes before him in the one room studio. She stated that she was not aware that the boy might have been upset by those events and that it was her belief from her long-term close contact with the family that his parents were similarly open with him in regard to their own bodies.

22. Subsequent to the child's interview with the police, A.B. testified that her child had revealed more details of the abuse, specifically that the petitioner had "whibbled his penis" and had asked him to pull down his pants.

23. The above information in paragraphs 12 to 22 was considered by the Department which subsequently decided to substantiate the report of child sexual abuse. Pursuant to the Department's policy at that time, the petitioner was not notified of the "finding" nor advised of her right to seek expungement. The child was referred to a psychologist for counseling.

24. After the finding was made, A.B. attempted to warn L.M., the friend referred to in Paragraph 15, about allowing her son to be with the petitioner. L.M. told her that she

did not believe the petitioner capable of such actions and criticized her for the actions she took against the petitioner. Several other mutual friends of the petitioner and A.B. subsequently became embroiled in the controversy, feeling they had to choose between the two friends, particularly because the petitioner was asking for financial help with her criminal defense.

24. As criminal charges against the petitioner were eventually dropped, the petitioner believed that the matter had been resolved.

25. E.R. went to see a psychologist shortly after his interview. The psychologist, who is a recognized expert in the area of child sexual abuse, interviewed A.B. the child's mother approximately a week after the SRS interview. In the course of that interview, A.B. told her in detail what allegations had been made by the child to her and asked her to evaluate the child to see if he needed counseling to deal with his experience. During that period, the psychologist saw the child twice, on November 3, and November 11, 1989. She did not ask the child to relate the events and did not read the transcript of the police interview. Instead her focus was on his reaction to the events. She noted that the child was angry and upset and regressed when the petitioner's name was mentioned. The child's alleged statements of the events as related by his mother were analyzed by the psychologist in terms of certain reliability criteria, including consistency, appropriateness of language

affect, detail and other. She concluded that he had been sexually abused by the petitioner. However, the psychologist concluded at that time that the child did not need therapy because the abuse was caught at an early stage, the abuser had been removed and the child was well protected by his parents.

27. This same psychologist is a member of a child abuse task force which was organized by SRS in the community to coordinate a plan for dealing with sexual abuse. During one of these team meetings, the psychologist allegedly brought up this case because it involved the unusual abuse by a female of a minor male and because the alleged perpetrator worked closely with and was frequently recommended as a source of health services by local social service providers. It was allegedly decided among providers at one of these meetings that no further referrals should be made to the petitioner on the basis of the "finding".[1] At least one social services organization cancelled a series of scheduled lectures to be given by the petitioner based on this information.

28. A member of this team who personally knew the petitioner recounted the information shared by the team to a second member of the team who also knew the petitioner and had apparently not been present at the meeting. That second team member believing the petitioner to be unaware that a "finding" had been made and concerned that these events were occurring determined to tell the petitioner of the finding

out of fairness to her. Before she did so, she called the Commissioner of Social and Rehabilitation Services to inform him that she intended to break her confidentiality and tell the petitioner so that she would have an opportunity to tell her side of the story. It was in this way that the petitioner and her attorney were informed of the substantiated "finding" made by the Department.

29. Both the psychologist who spoke with the child and another psychologist called by the petitioner, who is also a recognized expert on child sexual abuse, gave considerable testimony as to the inherent credibility and reliability of statements made by young children regarding sexual abuse. It was the child's expert's opinion that children rarely lie about these events, are no more suggestible about the central facts than the general population and that statements made by the alleged perpetrator therefore had little or no significance in regard to determining credibility. She also testified that there are no tests which could be given to determine whether a person was likely to commit sexual abuse. While the petitioner's expert agreed with the last statement, it was his opinion based on a recent scientific study that children might be more suggestible than adults and also emphasized the importance of considering statements of all involved and the context in order to ascertain the credibility of the child. He agreed with the child's psychologist based upon his review of the transcript of the SRS interview, that the

child's statements appeared to be his own thoughts. His assessment was based on the same criteria used by the petitioner's psychologist to assess the reliability of the child's statements, criteria such as consistency, choice of vocabulary, spontaneity of the offer, and the lack of leading questions and the like. The child's psychologist also testified that the child's statements clearly infer that sexually abusive behavior was taking place even if the only behavior described was exposure and even if all the child was describing was the "body parts game". It was her opinion that the child was describing grooming behavior based primarily upon his reaction to that event. The petitioner's psychologist stated that something of a sexual nature was being described by the child but the child's failure to place his allegations of seeing the body parts in context made it difficult to conclude that sexual abuse had occurred. He described context as an important part of determining whether behavior was sexually abusive. While both psychologists' testimony as to their observations about the child's behavior and the indicia for assessing credibility are admissible, no weight can be given to their statements involving the credibility of the child or their opinion as to whether the child was sexually abused by the petitioner.

30. Based on all of the above admissible information, the preponderance of admissible evidence indicates that the recorded statements of October 25, 1989 made by E.R. are the

child's own credible statements made with regard to events which occurred at the petitioner's studio. While there is a considerable amount of cajoling going on and it is clear that he has discussed this matter in some detail with his mother, it does not appear that his statements themselves are coached.

31. It cannot be concluded, however, that any of the statements purportedly made by E.R. to A.B. as set forth in paragraphs 12, 16, and 22 above are of the same level of reliability as the recorded statements. No further SRS or police interview was conducted with the child concerning these further charges. While A.B. made notes of the earlier charges, the child's contemporaneous taped interview did not contain any of those charges. Later alleged charges were not documented in any way or repeated to any other investigators. There was some testimony that E.R. might have made similar statements to the psychologist over one year later. However, as the psychologist admitted the facts of the alleged abuse were given to her in considerable detail by the mother herself and made no recording of the child's statements it cannot reasonably be found that the psychologist remembered ever hearing these alleged statements only from the child himself. While clearly hearsay statements as those offered by A.B. have been allowed and given weight in previous proceedings because they had some inherent reliability, it must be concluded that her hearsay statements here are to be given little or

no weight for several reasons. The first is that the child did not reveal this information to any of his other adult interrogators and this information conflicts with the recorded information he did give. Second, although there is no evidence that A.B. had any motivation to coach her child to fabricate the initial report, as time went on and she took irrevocable actions against the petitioner which caused her to lose her home, her reputation in the professional community and part of her livelihood and which caused mutual friends to question her actions, the petitioner's stake in justifying her position increased. The petitioner's letter of October 25, vividly demonstrates that the petitioner was already irrevocably bent on action against the petitioner (she wanted her arrested for a felony) and showed a desire to keep her from defending herself in this matter. Because her statements are subject to these concerns, it cannot be found that her statements as to what the child said have inherent reliability so as to overcome the hearsay problem.

32. If sexual abuse is found in this matter, it must be based on the transcribed statements of the child and the context surrounding those statements. Although it is found that the information reported by the child in his interview was his attempt to describe having viewed the buttocks or genital area of the petitioner, ("She showed her vagina and her bottom at me." Tr. 2, 7, 10, 17, and 19), it cannot be found from his statements that it was more likely than not that he viewed deliberate exposure intended to exploit him.

There is no language from which it can be concluded that the child was inappropriately touched by the petitioner. There is indeed some language which indicates that the petitioner desired privacy from him ("She wanted privacy" Tr. 5, "She shut the door" Tr. 6). Other statements made by the child as to the supposed secret nature of these events and repetition are not enough from which to conclude deliberate exposure. The child, who has been described as very articulate made statements here which are sparse and totally ambiguous as to context. If deliberate exposure or touching was going on, the child should have been able to describe it. His failure to do so cannot in fairness be extrapolated to a totally speculative scenario of abuse.

Neither can it be concluded based primarily on his affect of anger, or regression when describing this matter, that the petitioner deliberately exposed herself to him to sexually exploit him. There are many reasons why a child could be angry with an adult and there were certainly a few very plausible ones put forth in this matter. The anger expressed by the child in the late spring and early summer was apparently limited to three occasions and abated shortly thereafter. By summer the child eagerly seized opportunities to be with the petitioner and displayed a good deal of affection and pleasure in the company of the petitioner. A.B.'s original explanation that her son may have been upset about his lack of contact with the petitioner in the late spring seems highly plausible given

the circumstances, which included a sudden and dramatic drop in contact and more guarded behavior on the part of the petitioner.

The child's upset reaction and regression when questioned about these events after October 20, similarly cannot fairly lead one to assume that the affect was the result of his having been sexually abused by the petitioner. A great deal of a very dramatic and traumatic nature was going on around the child in the days following his October 20 discussion with his mother and his subsequent interviews. His mother was, by credible accounts, visibly upset over the following weekend and very upset by the Sunday following the disclosure. She had several conversations with the child before the interview in which she told him she was angry and upset and would protect him. Although the mother's desire to protect her child in this circumstance was entirely understandable, she nevertheless took swift, decisive and rather high-profile actions against the petitioner which were highly charged and undoubtedly had a strong impact on him. The boy knew that the petitioner who had been a close friend of his was to be taken away by the police. After that interview but before he talked with the psychologist, the boy had the additional experience of knowing that the petitioner had been taken away and that he was never to see her again. Given the atmosphere and ensuing events engendered by the child's statement, it is equally, if not more likely that the child was upset by his

mother's reaction to his disclosure and by the way the petitioner was precipitously removed from his life than by anything that the petitioner actually did to him. Neither can it be concluded from the child's "potty talk" that the petitioner sexually abused him. That kind of talk, which went on for months before the alleged abuse and abated sometime afterwards, was described as normal in four year olds. No evidentiary connection that could fairly be given of any weight was made between his language and the alleged sexual abuse here.

33. Based on all the above evidence, it cannot be found that it is more likely than not that E.R. was describing sexually abusive behavior by the petitioner in his interview with SRS. There is no other credible evidence upon which it could be concluded that this occurred.

34. It cannot be found that the petitioner's "mooning" the boy in the body parts game in the early spring was done with any intent to sexually exploit him.

ORDER

The Department's decision that the report of abuse with regard to E.R. is substantiated is reversed, and the record containing these matters is expunged from the Department's registry.

REASONS

The petitioner has made application for an order expunging the record of the alleged incident of child abuse from the SRS registry. This application is governed by 33

V.S.A. ə 4916 which provides in pertinent part as follows:

> (a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 4915 of this Title unless the commissioner or the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.
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> . . .
>
> (h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, the department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The department has the burden of demonstrating by a preponderance of the evidence introduced at the hearing not only that the report is based upon accurate and reliable information, but also that the information would lead a reasonable person to believe that a child has been abused or neglected. 33 V.S.A. ə 4912(10) and Fair Hearings No. 10,136, 8646, and 8110.

"Sexual abuse" is specifically defined by 33 V.S.A. ə 4912 as follows:

> (8) "Sexual abuse" consists of any act by any person involving sexual molestation or

> exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

In this case there is no credible evidence that the petitioner molested, exploited, or otherwise sexually abused the child in question. At best, it could be concluded from the child's testimony that he saw her vaginal area and buttocks while visiting in her studio on one or more occasions. There is absolutely no context in the evidence from which it could be found more likely than not that deliberate exposure, touching, or other sexually abusive behavior was occurring in the petitioner's studio. The Department's argument that showing the genital or buttocks to a child even as part of a game is per se sexually exploitive is unequivocally rejected. The context surrounding this event must evidence intent to exploit. There is no evidence of that type here. Therefore, the Department's decision should be reversed, and the reports expunged from the registry.

* * *

The Department of Social and Rehabilitation Services has represented in recent hearings that it now routinely notifies alleged perpetrators of substantiated reports so that they may exercise their statutorily guaranteed appeal

rights. See 33 V.S.A. ə 4916(h). The facts in this case show the grave injustice which can occur when the state keeps these reports secret from the alleged perpetrator. It also shows how the required confidentially of these reports can be breached to the detriment of parties involved. A discussion of the confidentiality requirements and appeals process with task force members may prevent such needless harm in the future.

FOOTNOTES

[1]This information in the preceding two sentences which is based on hearsay is offered to show how the petitioner claims she found out about the substantiation. As these facts are not necessary to a determination in this case, no finding is made as to whether this actually occurred in exactly this way.

RECOMMENDATIONS ON DEPARTMENT'S

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Paragraphs 1-7 are supported by the evidence.

8) Supported by the evidence except the friendship appeared to continue until October 20, 1989.

9) Supported by the evidence.

10) Supported by the evidence.

11) Supported by the evidence.

12) It cannot be found that E.R. chose not to be alone with the petitioner because he took a walk alone with her in the summer. Neither can it be found that he "chose", except on one occasion, not to be with her as during that summer she extended no invitation which he could

refuse. The evidence supports the fact that they spent affectionate times in the presence of others.

13) Supported by the evidence.

14) Supported by the evidence.

15) The evidence shows that E.R. was fixated on terms for genitals since the winter of 1988-1989.

16) The evidence shows that E.R. began using "potty talk" during the winter of 1988-1989. The evidence supports the report of the specific statement made by E.R.

17) The evidence supports the three occasions of aggression listed therein but does not support aggression on every encounter. The evidence supports A.B.'s testimony.

18) Supported by the evidence.

19) Supported by the evidence except there is no evidence as to Ms. J. bearing a physical resemblance to Ms. S. and even if there were, it would be deemed not probative.

20) Supported by the evidence except for the times when he began using "potty talk" which was specifically fixed by other witnesses. The ending date of the language was not specifically fixed or linked to October 20, 1989. The evidence was inconclusive as to whether E.R. knew the exact location (internal or external) of a vagina.

21) Supported by the evidence.

22 - 30) Supported by the evidence but the statements made by E.R. to A.B. in these were not given weight for

the truth of the matters asserted therein for reasons set forth in the recommendation.

31) Generally supported by the evidence although he did criticize the "reward method" used by the interrogators questions to get E.R. to answer questions.

32) The transcript has been made part of the findings of fact and speaks for itself. The drawing of the "cave" and the placement of the petitioner's vagina on the drawing were considered by the fact finder to be of little or no probative value in this matter as testimony linking this to the petitioner's conduct was highly speculative and of little value.

33) Supported by the evidence except statements made by E.R. to A.B. are not being admitted for their accuracy and truth for reasons set forth in the opinion.

34) Supported by the evidence.

35) Supported by the evidence except the evidence shows she said he probably saw her.

36) Supported by the evidence.

37) Supported by the evidence.

38) Supported by the evidence except that the appearance of the hair in the drawing is the mother's characterization, is highly speculative and is given no probative weight.

39) The exact date of the cessation of the potty talk is not in evidence. The aggressive behavior stopped sometime in the summer of 1989.

40) Supported by the evidence but this hearsay statement is given no weight for the truth of the matter for reasons set forth in opinion.

41) Supported by the evidence but the same reservations as Paragraph 40.

42) Supported by the evidence.

43) Supported by the evidence but no weight is given to another's conclusion as to the credibility of witnesses. The hearing officer must make that determination independently.

44) Supported by the evidence.

45) Supported by the evidence as to her opinion but no weight is given to another's conclusions of credibility--the hearing officer must independently make that determination.

46) Supported by the evidence.

47) Supported by the evidence.

48) Supported by the evidence as to her opinion but no weight is given to another's conclusion on witness creditability--the hearing officer must independently make that determination.

49) Supported by the evidence.

50) Supported by the evidence.

51) Supported by the evidence as to her opinion and findings but no weight is given to another's conclusions on witness credibility--the hearing officer must independently make that determination.

52) Supported by the evidence but statements allegedly made by E.R. were not taped or recorded verbatim, were made almost one and a half years after the event (and after an appeal was filed), and, therefore, did not provide sufficient evidence to overcome the hearsay rule and be used for the truth of the matter stated therein.

53) The review was done at hearing at the request of the hearing officer, not before her interview with E.R. The rest of this recitation of her statement is supported by the evidence. However, the hearing officer is not bound to adopt her opinion on credibility and does not do so for reasons set out in the recommendation.

54) That this was Dr. S.'s testimony is supported by the evidence.

55) That this was Dr. S.'s testimony is supported by the evidence. Some of this testimony was contradicted by Dr. H., another witness. The hearing officer does not believe it is necessary to choose who was "right" when there was only minor disagreement between the witnesses and as both of their testimony as to the child's behavior and factors to consider in assessing credibility was helpful to the hearing officer in drawing her own conclusion that the child's transcribed interview were the truly expressed thoughts of this child.

56) That this was Dr. S.'s testimony is support by the

evidence. However, her opinion on credibility has no weight in this matter. The hearing officer is required to make her own determination as to the credibility of witnesses.

57) Supported by the evidence.

58) Supported by the evidence.

59) Supported by the evidence. However, his opinion on the ultimate issue of credibility has no weight in this matter.

60) Supported by the evidence.

61) Supported by the evidence except as to (b) which Dr. H. could not say with any certainty.

62) Supported by the evidence.

63) Supported by the evidence but she said it was likely he saw her not that he definitely did.

64) Supported by the evidence.

65) Supported by the evidence.

66) Supported by the evidence but she also testified that he continued to show affection for her except for those three occasions.

67) Supported by the evidence.

68) Supported by the evidence.

69) Supported by the evidence for the three occasions in late spring and early summer.

70) Supported by the evidence.

71) Supported by the evidence.

72) Supported by the evidence.

73) Supported by the evidence only as to the initial report to SRS.

74) No finding can fairly be made adopting those statements because of a lack of contemporaneous transcriptions or recordings and E.R.'s failure to make similar statements when he was recorded on transcript and other reasons set out in the opinion.

75) His transcribed reports are credible.

76) Not supported by the evidence.

It is recommended that the Board make the following rulings on the petitioner's Proposed Conclusions of Law:

1. Adopted.
2. Adopted.
3. Denied - Hearings before the Board are de novo.
4. Adopted.
5. Denied - Due process both requires the Department to state facts supporting its action to the perpetrator in its notice and limits the Department to those facts unless the notice is amended before hearing.
6. Adopted insofar as the Board has permitted hearsay testimony in the discretion of the hearing officers when presenting that testimony in an admissible way would present a hardship and the statement itself has some intrinsic reliability. Under this rule, transcribed statements of young witnesses are generally allowed to show their statements. Testimony by others

as to what the child said are admitted and given weight solely under the "relaxed hearsay rule" within the discretion of the hearing officer. See Fair Hearing Rule 14.

7. Adopted insofar as the Board's jurisdiction over tort complaints.

8. Denied - The Board has taken the position with the Department in every case that the appeal provision in 33 V.S.A. ə 4916(h) implies that the petitioner receive notice of the substantiation of a finding and the grounds therefore. It is not the hearing officer's understanding that the petitioner claims lack of notice at this time but rather seeks to restrict the grounds to those officially noticed to her.

9. Denied.

10. Denied.

11. Denied - It cannot be said that the sexual behavior of a parent could never bear a relation to a child's sexual abuse report. However, there was no evidence here that the parent's sexual behavior influenced the child's report.

12. It is not clear to what the Department refers so no recommendation can be made on this ruling.

13. The hearing officer could not see the relevance of this question to this proceeding but is unwilling to agree to the blanket conclusions drawn by the Department.

14. This is not a request for a legal ruling.

15. Denied - Some of the statements E.R. was purported to have said from October 20-25 were written down but a contemporaneous recorded interview on the 25th did not reveal statements consistent with those remarks. In addition, A.B.'s own statements in her letter indicate that by October 25th, her demeanor toward the petitioner was adversarial and her main motivation was to remove the petitioner from the studio with all haste, and not to necessarily get the true facts into the open.

16. Adopted.

17. Denied - E.R. made no statements to Dr. S. about the actual events until some fourteen months after the events. Dr. S. had also learned of these events in detail from A.B. Because of this and as there is no record or transcript of her third meeting with E.R., it is impossible to conclude that her account of E.R.'s actual statements to her are accurate and reliable.

18. Adopted only as to the statements recorded and transcribed on October 25, 1989.

19. This is a request for a fact finding previously covered.

20. Same as paragraph 19.

21. Same as paragraph 19.

22. Same as paragraph 19.

23. Denied - It cannot be concluded that the child's transcribed statement more likely than not described

behavior defined in the described statute. Neither can it be concluded that behavior admitted to by the petitioner fits into the statutory description of sexual abuse. The Department's request to define all exposure of body parts by non-family members to children in their care, is denied because the context of the exposure must be examined in each case to determine whether the definition is met.

24. Denied.

RECOMMENDATIONS ON PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW

1 - 2) The parents were present at the interview and made statements encouraging him to make statements with regard to the petitioner.

3) Denied. The interview format is found to be basically reliable although the child was frequently cajoled into answering questions.

4) The transcript is made part of the findings and speaks for itself. It can be concluded from the transcript that the child saw the petitioner's buttocks or vaginal area. It cannot be concluded from the transcript what context it was in.

5) Supported by the evidence as to the facts denied as to the conclusion.

6) Denied. Her testimony indicated that seeing the body

parts alone could be abuse if it were done deliberately to prepare a child for further sexual behavior.

7) Supported by the evidence.

8) Supported by the evidence except there is little evidence that the child was eager to please.

9 - 29) This is an accurate description of the testimony which was given. No request to find facts on these paragraphs were made. Many are covered in the proposed findings of fact.

31) Supported by the evidence.

32 - 33) See paragraph No. 9 above.

34) Supported by the evidence.

35 - 38) See paragraph No. 9 above.

39) This is a blanket conclusion upon which there is little evidence. However, common sense would indicate that to the extent a child could avoid a person associated with unpleasant behavior (other than a parent), he or she would do it.

40 - 42) See paragraph No. 9 above.

43) Supported by the evidence.

44- 47) See paragraph No. 9 above.

48) Supported by the evidence.

49) (Missing)

50) Supported by the evidence except no finding is made as to the conflict of interest as it does not affect the petitioner but is a matter between E.R. and the state.

51) Supported by the evidence.

52) Calls for a legal conclusion not a factual finding. However, the Board had held that subsequent similar evidence which bolsters the prior finding is admissible. However, if it contains different facts, the petitioner must be notified before the hearing if those facts are being relied on to further substantiate the finding.

53) Supported by the evidence at least as to her two interviews in 1989.

54) Supported by the evidence.

55) She so testified.

56) The statements allegedly made by E.R. in the 1991 interview were not included in the letter of substantiation to the petitioner and cannot in fairness be used against the petitioner now. In addition, the hearing officer has given no weight to those statements because they are hearsay and do not fit the criteria of the relaxed hearsay rule.

57) Dr. S. so testified.

58) Dr. S. so testified.

59) (Missing)

60) Supported by the evidence except that he did not specifically say that she had not abused the child but that she seemed like a credible and sincere person. That testimony on credibility is given no weight.

61) Dr. H. so testified.

62 - 64) Dr. H. so testified.

65) Denied - This statement is a broad and inexact rendition of Dr. H.'s statements.

EVIDENTIARY RULINGS

1) The child's statements to investigators as recorded and transcribed are found to meet the indicia of the relaxed hearsay rule for reasons set forth elsewhere in the findings of fact. See also Fair Hearing No. 10,136.

2) The child's statements as related by his mother and by his psychologist are found to not meet the indicia of the relaxed hearsay rule for reasons set forth in the findings of fact.

3) Statements on the ultimate issue of credibility of the child witness or the alleged perpetrator made by witnesses, expert and otherwise, are given no weight in these proceedings. Indicia to be used to assess the child's credibility given by expert witnesses are considered and given some weight as are statements as to the child's or witnesses' behavior. However, these factors are not found to be all that different from those used to assess the credibility of any witness and ultimately that credibility must be determined on a case by case basis.

4) This hearing is held de novo pursuant to 3 V.S.A. ə 3091 as directed by 33 V.S.A. ə 4916(h).

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